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U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 03 2009

SRC 07 800 22310

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral researcher at the University of California, Davis (UCD). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of materials already in the record.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

To discuss the petitioner's work and its significance, the petitioner submitted six witness letters with the initial filing of the petition. [redacted], of the Center for Brain Science Research at Fudan University, Shanghai, China, stated:

> [The petitioner] was my Ph.D. student from 1999 to 2004. . . .

[The petitioner] is pursuing three lines of research: 1) how animals and human beings see things, 2) what are the retina and brain mechanisms underlying vision, and 3) how Glaucoma causes the visual function loss. . . .

The central theme of [the petitioner's] novel work is that the functional properties of the retinal ganglion cells and afferent neurons are essential to the shape perception experienced in natural environments. In establishing this theory, [the petitioner] has made many important achievements in the areas of functional properties of retinal ganglion cells, brain functional architecture and related brain malfunction caused by acute Glaucoma.

[redacted] *of Northwestern University, Evanston, Illinois, stated:*

I have long known and collaborated with [the petitioner's] Ph.D. advisor, [redacted] who is an eminent neuroscientist in the P.R. China, . . .

From September 2004 to July 2005, [the petitioner] did postdoctoral research in my laboratory. **I was his direct supervisor. [The petitioner's] research dealt with** characterizing the receptive field properties of retinal ganglion cells using the in vivo single cell extracellular recording technique. He was also engaged in some theoretical modeling work and helped develop some new software for the laboratory. . . .

Currently, [the petitioner] is doing further postdoctoral research with [redacted] at the University of California, Davis. He is working at the leading edge of visual neuroscience by researching about retinal ganglion cell development, the pattern formation of retinogeniculate projection, and mechanisms of neurotransmitter regulation.

Regarding the petitioner's most recent work, [redacted] stated:

[The petitioner] joined our laboratory in 2005. . . . Without question, [the petitioner] has contributed significantly to our understanding of the functional role of retinal activity in the early stages of visual system development. [The petitioner] extended and clarified our understanding of how neuronal activity serves to regulate the development of two key features of mammalian retinal ganglion cells: their dendritic morphologies and their eye-specific projections to the brain. This information will have relevant implications for future studies of human visual system development as well as the myriad ontogenetic disorders that can adversely impact human vision.

[redacted] stated:

[The petitioner] and I have been collaborating on an exciting project for a year to decipher the implication of retinal activity in the visual system development. The

purpose of this project is to find mechanisms that may potentially lead to therapeutic application for treatment of human retinal disease. Through this collaboration, I found that [the petitioner] is a very talented scientist with excellent potential. . . .

[The petitioner's] current project in [redacted]s lab is to clarify how the complex visual system is developed in the fetal and neonatal stages. It has been known that the malfunction of neurotransmitters, such as acetylcholine or glutamate, in the visual system of young children would lead to life-long loss of vision. . . . Understanding the neural mechanisms of acetylcholine and glutamate systems in the brain will likely provide clinically useful therapeutic approaches to cure these neurological disorders.

of Wake Forest University School of Medicine, Winston-Salem, North Carolina, stated:

I have met [the petitioner] and spent time with him. I am also well aware of his research. I met him when I attended his presentation at the Shanghai International Conference On Physiological Biophysics (SICPB 2006) in Shanghai, China, last November. I was impressed by his excellent presentation and his significant and original contribution in the area of retina development research, especially the effects of neurotransmitters to retinal ganglion cell activity. . . .

Although it has long been realized that spontaneous retinal activity exists in the early stages of human visual system development, their specific roles in retinogeniculate projection (i.e., the pathway that the retina uses to send visual information to the brain) have remained unclear. Thus, determining whether there is a link between retinal activation and the visual pathway development is of great importance. [The petitioner's] recent results have showed that spontaneous activity of retinal ganglion cells play a very important role in the early mammalian and human visual system development. Based on his presentation and publication, I would like to say that [the petitioner's] accomplishments are extremely impressive and significant. His current research findings are crucial to the elucidation of the function of retinal activity in the visual system development.

[redacted], of Tulane University School of Medicine, New Orleans, Louisiana, stated:

I am aware of [the petitioner's] significant and original contributions from his high quality papers. [The petitioner] has made significant contributions in the areas of functional properties of retinal ganglion cells, brain functional architecture and related brain malfunction caused by acute glaucoma. For example, [the petitioner] developed a progressive theory about the function of the retinal ganglions. He proposed that the way we perceive complex orientation is based on the function of retinal ganglion cells, instead of the cortex neurons. Experiments proved that his theory accurately accounts

> for a variety of perceptual phenomena that have puzzled vision scientists for many years. His findings also revealed that silicone oil tamponade is a safe treatment for complicated retinal detachment. . . .
>
> [The petitioner] has proven himself to be an absolutely brilliant scientist in the field of development and function of visual system research. He has made several important contributions to find factors that regulate the structural and functional properties of retinal ganglion cells and has repeatedly demonstrated that he has surpassed his peers in the same area. . . . [The petitioner's] contributions to the research are of fundamental importance to the understanding of functional and developmental construction of the visual system.

The petitioner submitted copies of four articles he co-wrote. To establish the significance of his published work, the petitioner submitted copies of 18 articles and book chapters (four of them in unpublished manuscript form) containing citations of his work. At least five of these citations were self-citations by the petitioner's co-authors. Because one article was in Chinese with no translation provided as required by 8 C.F.R. § 103.2(b)(3), we cannot determine the identities of its authors. Thus, the petitioner's initial submission contained, at most, nine published independent citations of the petitioner's work. Every citation pertains to the petitioner's work in [redacted] **laboratory in China,** and therefore this evidence does not establish the reception or impact of the petitioner's more recent work in the United States.

On December 20, 2007, the director issued a request for evidence, instructing the petitioner to "[s]ubmit documentary evidence of the exact influence the beneficiary's work has had on his specialty or on the field in general," including evidence of citation of published work. In response, counsel stated: "Petitioner's work has been cited a significant 26 times by non-affiliated researchers." An accompanying exhibit index identified Exhibit 49 as "**26 independent citations** of [the petitioner's] work" (emphasis in original). Exhibit 49 includes several articles by the petitioner himself, along with 26 other pieces that contain citations to his work, including duplications from the prior submission. Eight of those 26 articles contain self-citations by the petitioner's collaborators, particularly Tiande Shou. Self-citation is common and accepted practice, but it is false and absurd to call the petitioner's citations of his own work "independent citations" "by non-affiliated researchers." The supplementary submission includes fourteen published independent citations of the petitioner's work, one untranslated article in Chinese of undetermined authorship, and three unpublished independent citations, including two graduate theses or dissertations.

The director denied the petition on April 10, 2008. The director acknowledged the petitioner's submission of citations and independent letters, but found that the petitioner has not established impact or influence in his field to an extent that would justify the national interest waiver.

On appeal, counsel observes that the authors of three previously submitted articles commented on the merits of the petitioner's work when citing his articles. Review of these articles indicates that the petitioner's work has not been singled out to the extent counsel implies. A 2004 review article from

Current Opinion in Ophthalmology included 35 articles in its bibliography. Three of those articles, including the petitioner's article, were marked "Of special interest." Five others were marked "Of outstanding interest."

The description of appellate Exhibit 5 reads:

> Copy of a citing paper rating one of [the petitioner's] first-authored works and noting that this work established one of the few new approaches that have "*bridged the gap between the signal processing mechanism at the molecular or cellular level and the information processing mechanism in the functional portions of the brain.*"

What follows is a more thorough excerpt, with references, from the article in question (a 2007 article from *Frontiers of Computer Science in China*):

> Doubts have been raised about the more traditional memory models that were based on weights-evolution and fixed structure. Therefore, new approaches have been tried which adopted neuron encoding [6], or structure-oriented learning [7], or sparse sub-networks [8], or dynamic neuron processing [9]. Research in cell encoding [10, 11], micro-circuits [12], functional columns [13, 14] and the structure and function of receptive fields [15] has bridged the gap between the signal-processing mechanism at the molecular or cellular level and the information-processing mechanism in the functional portions of the brain. So, research into AI models fusing memory, perception, and representation is becoming more prominent [16-18].

Reference 15 is a 2004 article by the petitioner. In context, it is far from clear that the petitioner's work merited greater attention than the dozen other articles referenced in the same excerpt shown above.

The third article discussed on appeal, from *Proceedings of the 2005 3rd International Conference on Intelligent Sensing and Information Processing*, appears to be the most favorable with specific reference to the petitioner's work; one sentence reads, in full: "Furthermore, very recent evidence in favour of extended surrounds [17] and also previously found evidences of zero-crossing detection [18, 19] at even higher stages of visual information processing, is highly significant from such a point of view." Reference 17 is a 2004 article by the petitioner.

The above references to the petitioner's work indicate that the petitioner's past work has been of use to other researchers, but the examples offered on appeal do not suffice to establish a pattern of especially substantial influence or impact on the field in comparison to other researchers in the specialty.

Counsel asserts that the petitioner "won the 2002 and 2004 International Brain Research Organization Fellowship. (Original Petition Exhibits 9-10) This is a clear indication that his work surpasses that of his peers." Original Exhibits 9 and 10 document the petitioner's membership in professional associations. Exhibit 11 was labeled "Documentation evidencing [the petitioner's] receipt of International Brain Research Organization Fellowship in 2002," but this exhibit is simply a certificate

showing that the petitioner "successfully completed the IBRO Course in Neuroscience at Fudan University, Oct. 21-29, 2002." There is no mention of any fellowship, and the petitioner was already a student at Fudan University in 2002, so his completion of a course there is not remarkable. Exhibit 12 identified the petitioner "as a recipient of a special IBRO Fellowship" in 2004. The purpose of the fellowship was to assist in the petitioner's "training in neuroscience," indicating that the fellowship was intended for individuals whose training was still considered incomplete. Counsel offers no persuasive argument that the petitioner's attendance at a short training course demonstrates his eligibility for the national interest waiver.

Counsel protests that the director "dismissed out of hand" the independent witness letters submitted in support of the petition. While such letters can establish eligibility, depending on a number of factors, there is no guarantee or requirement that the submission of independent witness letters must inevitably result in approval of a given petition. The statutory job offer requirement is not limited to researchers whose work is entirely ignored and lacking in practical application (which would be the logical corollary of a finding that *any* influence is enough influence to merit a waiver). Each record of proceeding must be considered independently and as a whole. The AAO does not question the expertise of the witnesses of record, but the record in its entirety does not persuasively establish that the petitioner's effect on his chosen field warrants the special benefit of a national interest waiver.

The record shows a pattern of exaggerated or inaccurate claims regarding the evidence submitted (such as the claim that articles by the petitioner's supervisor are from "non-affiliated" authors). While the petitioner's research work is not without value, and shows promise for future progress, the request for the waiver in this instance appears to have been premature at best.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.